Supreme Court, U. S.
FILED
DEC 2 1999
CLERK

No. 99-772

In The

Supreme Court of the United States

JOHN DOE AND RICHARD SMITH,

Petitioners,

v.

MUTUAL OF OMAHA INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOEL H. KAPLAN
(Counsel of Record)
THOMAS J. PISKORSKI
CASSANDRA L. CURRY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT REQUIRED BY RULE 29.6

Mutual of Omaha Insurance Company has no parent company and no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

OPPOSITION TO PETITION FOR CERTIORARI 1

COUNTER STATEMENT OF THE CASE 2

A. Factual Background 2

1. Petitioners And Their Insurance Policies With Mutual..... 2

B. Proceedings 4

1. The District Court Proceedings..... 4

2. Seventh Circuit Proceedings..... 7

REASONS FOR DENYING THE WRIT 9

I. The Circuit Courts Have Uniformly Held That ADA Title III Only Regulates Access To Goods And Services Offered By A Place Of Public Accommodation And Does Not Reach The Content Of Insurance Policies 9

A. The Text And Structure Of ADA Title III Make Clear That It Only Regulates Access To The Goods And Services Of A Place Of Public Accommodation And Not The Content Of Such Goods And Services 10

B. Every Circuit Court Has Rejected Petitioners' Argument That Coverage Limits On Disabling Conditions In An Insurance Policy Discriminate On The Basis Of Disability In Violation Of ADA Title III..... 14

C. Neither *Carparts* Nor Any Other Circuit Court Has Held That The Content Of Insurance Policies Is Regulated By Title III Of The ADA..... 18

TABLE OF CONTENTS – Continued

Page

D. The Seventh Circuit, As Well As Every Other Circuit Court To Reach The Issue, Properly Refused To Defer To The Department Of Justice's Interpretation Of ADA Title III 21

II. The Seventh Circuit's Holding That The McCarran-Ferguson Act Precludes The Application Of Section 302(a) To The Terms Of Insurance Policies Is Consistent With Supreme Court And Federal Appeals Court Case Law..... 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985) 15

Bragdon v. Abbott, 524 U.S. 624 (1998) 14, 23

Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994) 18, 19, 20, 21

EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996) 15, 16

Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 850 (1999) ..... *passim*

Henderson v. Bodine Aluminum, Inc., 70 F.3d 958 (8th Cir. 1995) 18

Humana Inc. v. Forsyth, 525 U.S. 299, 119 S. Ct. 710 (1999) 23, 24

Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453 (6th Cir. 1998) 11, 12, 13, 17

Lewis v. Kmart Corp., 180 F.3d 166 (4th Cir. 1999) 16

Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113 (3d Cir. 1998) 12

Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997) 15

Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (*en banc*), *cert. denied*, ___ U.S. ___, 118 S. Ct. 871 (1998) ..... *passim*

Rogers v. Dept. of Health and Envtl. Control, 174 F.3d 431 (4th Cir. 1999) 16

TABLE OF AUTHORITIES – Continued

Page

Sutton v. United Air Lines, Inc., ___ U.S. ___, 119 S. Ct. 2139 (1999) 23

Traynor v. Turnage, 485 U.S. 535 (1988) 15

STATUTES

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) 23

29 U.S.C. § 794 14

42 U.S.C. § 12181(7)(F) 10

42 U.S.C. § 12182(a) 5, 10

42 U.S.C. § 12201(c) 5

215 ILCS 5/1 *et seq.* 2

215 ILCS 5/364 ..... 5, 25

410 ILCS 50/3(c) 25

OTHER

28 C.F.R. Ch. 1, Pt. 36, App. B (1998) 22

28 C.F.R. § 36.307(a) 22

Fed. R. Civ. P. 12(b)(6) 5

OPPOSITION TO PETITION FOR CERTIORARI

The Petition should be denied because the Circuit Courts uniformly have held that the Americans with Disabilities Act ("ADA") does not regulate the content of insurance policies and does not require coverage parity for all medical conditions. Although Petitioners assert a false circuit conflict in trying to obtain review, the inarguable fact is that there is no split in the circuits with regard to these holdings. As even Petitioners concede, the Third, Fourth, Sixth, Seventh and District of Columbia Circuits have all held that coverage limits on benefits for the treatment of disabling medical conditions is not unlawful disability discrimination as long as all persons, whether disabled or not, have access to the same health insurance policy. Furthermore, the Circuit Courts' holdings are in full accord with apposite decisions by this Court.

The Seventh Circuit's decision that ADA Title III guarantees equal access to goods and services offered by places of public accommodation – not equal results from the use of the goods and services – is also consistent with decisions of all other Courts of Appeals to reach the issue. It is the latter result which Petitioners would like this Court to adopt, a result which, as one Court of Appeals recognized, would "require a seismic shift in the insurance business." *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 850 (1999). In this case, the undisputed record establishes that both Petitioners were afforded the same access to the same health insurance policies as other Mutual of Omaha Insurance Company customers. Because each Petitioner received full and equal access to the same policies offered to other customers, the Seventh Circuit correctly held that there was no ADA violation.

One additional fact is important as to why the Petition is undeserving of review. The identical issues raised by Petitioners in this case were raised in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 871 (1998), and *Ford*. In both cases, this Court declined review. Nothing has changed in the case law in the short period of time since then to warrant a different result.

Because the Seventh Circuit's decision is in full accord with decisions by the other Circuit Courts and this Court, and because there is no issue of fundamental importance, there is no compelling reason for review by this Court. Therefore, the Petition should be denied.

COUNTER STATEMENT OF THE CASE[1]

A. Factual Background

1. Petitioners And Their Insurance Policies With Mutual

Mutual of Omaha Insurance Company ("Mutual") is an insurance company which sells, among other things, individual health insurance policies throughout the country. R. 27 at p. 3. It is licensed to transact business in Illinois, R. 27 at p. 3, where it is subject to extensive regulation by the Illinois Department of Insurance. 215 ILCS 5/1 *et seq.*

[1] Respondent submits this Counter Statement of the Case because Petitioners' Statement omits important record evidence which underlies the Seventh Circuit's holding that Mutual's health insurance policies did not violate ADA Title III.

Petitioner Richard Smith purchased an individual health insurance policy from Mutual in April 1992. In November 1996, four and one-half years after he obtained his Mutual policy, Smith tested positive for the human immunodeficiency virus ("HIV"). App. 37a.

Petitioner John Doe elected to purchase insurance from Mutual as part of an offer Mutual made to former insureds of Principal Mutual Insurance Company ("Principal") when Principal exited the individual health insurance business in 1997. App. 31a. Faced with the loss of his Principal policy and believing he would not be able to obtain other health coverage because of his HIV-positive condition, Doe purchased Mutual's policy. R. 1 at p. 3. Although the Mutual policy issued to Doe contains a preexisting condition limitation, this limitation was waived for Doe and all former Principal insureds. R. 1 at p. 3.

Petitioners' policies were issued to them as members of an Employed Persons Group Insurance Trust. App. 1b, 21b. The Trust and filings related to the Trust were filed with and approved by the State of Alaska Insurance Department. Trust documents also were filed with the Illinois Department of Insurance. R. 34, Exhibit F at p. 5. Doe and Smith received the same individual health insurance policies Mutual offered to other customers. Mutual did not vary the terms of the policy or charge a higher price.

The policies Smith and Doe purchased, as with other policies, limit benefits for Acquired Immune Deficiency Syndrome ("AIDS") and AIDS Related Conditions

("ARC") (hereinafter the "AIDS Caps") – a lifetime maximum of $100,000 for Doe and $25,000 for Smith. App. 20a. Once the limits are reached, benefits for AIDS or ARC cannot be reinstated. Generally, the policies limit benefits for other, but not all, medical conditions to a lifetime maximum of $1 million. This $1 million limit may be reinstated if no further expenses are incurred within two years. App. 20a.

Petitioners understandably focus on the AIDS Caps, but these are not the only coverage limitations in the policies. App. 3a. Petitioners' policies contain many other benefit limits, as well as coverage exclusions. Section K in Petitioners' policies, entitled "Exceptions and Limitations," outlines those expenses which are not covered expenses under each policy. App. 14b-15b, 30b-31b. For example, Petitioners' policies limit benefits for alcoholism and drug addiction treatment. App. 8b, 31b. The policies also exclude altogether expenses for, among other things, mental or nervous disease and learning disabilities, the promotion of fertility, obesity not caused by sickness or injury, eye refractions, eyeglasses, and hearing aids or their fittings. App. 14b, 30b. Smith's policy limits benefits paid for most drugs and medicines to a calendar year maximum of $5,000. App. 7b. Other limitations apply to certain other medical conditions and/or procedures. App. 14b-15b, 30b-31b.

B. Proceedings

1. The District Court Proceedings

Petitioners' Complaint alleged that the AIDS Caps violated Section 302(a) of Title III of the ADA, 42 U.S.C.

§ 12182(a), and the Illinois Insurance Code, 215 ILCS 5/364. On February 19, 1998, Mutual filed a motion to dismiss both claims pursuant to Fed. R. Civ. P. 12(b)(6). On April 3, 1998, the District Court denied Mutual's motion to dismiss Petitioners' ADA claim.[2] Disregarding uniform Circuit Court authority, the District Court (1) rejected Mutual's argument that ADA Title III regulates only access to the goods and services of places of public accommodation, and instead held that ADA Title III applies to and regulates the content of health insurance policies, App. 67a, and (2) concluded that the AIDS Caps discriminated against Petitioners on the basis of a disability in violation of the ADA. App. 76a. It also found that the McCarran-Ferguson Act did not preclude ADA application to the business of insurance. App. 74a. The District Court further ruled that the only way the policy limits could be upheld was if Mutual could establish, under Section 501(c) of the ADA, 42 U.S.C. § 12201(c), that they were "consistent with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification." App. 72a.

On April 8, 1998, Mutual filed a motion to certify for interlocutory appeal the legal issues relating to Petitioners' ADA claim, which motion was denied by the District Court. R. 25-26. To avoid massive and costly discovery in a case that, in its judgment, turned on legal issues, Mutual proposed to Petitioners a final judgment

---

[2] The District Court dismissed the Illinois Insurance Code claim, holding that Petitioners could not assert a private cause of action under the Code. Petitioners did not appeal the dismissal to the Seventh Circuit.

which would have provided them with a judgment in their favor on their ADA claim and full relief (including enjoining the AIDS Caps). In exchange, all Mutual sought was the express preservation of its right to appeal the purely legal arguments asserted in its motion to dismiss. In August 1998, the parties reached an agreement on the language of a final judgment, but Petitioners abruptly reneged on the agreement. R. 39, Exhibit 1 at pp. 6-7.

Thereafter, Mutual renewed its efforts to narrow discovery so the legal issues could be decided by the appellate court. Specifically, Mutual filed a motion to amend its answer to, among other things, withdraw its Section 501(c) defense. R. 45. Notwithstanding Mutual's withdrawal of this defense, R. 46-47, the District Court ordered massive and burdensome discovery relating to actuarial and other justification for the AIDS Caps.[3]

Although Mutual maintained that it had a legitimate business justification for its AIDS Caps, it agreed to a second stipulated final judgment so that it could avoid burdensome discovery but still have the controlling legal

---

[3] Among other requests, Petitioners sought all documents relating to Mutual's actuarial data, underwriting practices, or any actual or reasonably anticipated experience concerning differences in coverage related to AIDS and ARC and all other medical conditions for which Mutual provides coverage under all policies it issues. Because it insures approximately 15 million persons, and provides coverage for between 14,000 to 21,000 medical conditions, R. 39, Exhibit 4, Mutual requested protection from the District Court. R. 36. Notwithstanding nine affidavits filed by Mutual describing the tens of thousands of hours required to respond to Petitioners' broad requests, R. 39, Exhibit 4, the District Court ordered full compliance. R. 42.

issues preserved for review by the Seventh Circuit. As the Seventh Circuit recognized, Mutual "didn't want to get into these messy [actuarial] issues if it could show that the Americans with Disabilities Act did not apply." App. 13a-14a. Accordingly, "[f]or purposes of this litigation only and without preclusive or collateral estoppel effect in any other matter," Mutual stipulated that "it will not produce evidence to show that its AIDS Caps are consistent with sound actuarial principles, actual or reasonably anticipated experience or bona fide risk classification or produce evidence that the AIDS Caps are based on or not inconsistent with state law" and cannot make this showing. App. 22a.

On December 1, 1998, the District Court entered final judgment in favor of Petitioners on their ADA claim based on the parties' stipulated final judgment. App. 18a.

2. Seventh Circuit Proceedings

On June 2, 1999, a divided panel of the Seventh Circuit reversed the District Court's ruling. In an opinion by Chief Judge Posner, joined by Judge Easterbrook, the court held that ADA Title III does not regulate the content of goods and services provided by a place of public accommodation:

> The core meaning of [Section 302(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the

> nondisabled do. . . . [S]ection 302(a) does not require a seller to alter his product to make it equally valuable to the disabled, even if the product is insurance.

App. 2a, 12a. The Seventh Circuit recognized that its holding is "consistent with all the appellate cases to consider [the scope of ADA Title III] or cognate issues." App. 12a. The Seventh Circuit further recognized that a contrary result would require all facilities open to the public to provide goods and services tailored for every disability and engage the federal courts in "standardless decisions about the composition of retail inventories." App. 3a-6a. Because Mutual sold insurance policies to Petitioners on the very same terms as to other customers, there was no unlawful disability discrimination under the ADA. App. 3a.

The Seventh Circuit also held that Petitioners' proposed extension of ADA Title III to the regulation of insurance policies would impair state law and run afoul of McCarran-Ferguson. Noting that state regulation of insurance is comprehensive and includes rate and coverage issues, the Seventh Circuit concluded that if federal courts were to determine whether limits on disabling conditions are actuarially sound and consistent with principles of state law, they would be "stepping on the toes of state insurance commissioners." App. 12a-13a. Accordingly, the court declined to displace the regulatory authority over the business of insurance historically exercised by the states.

Without citing any supporting Circuit Court authority, dissenting Judge Evans concluded that Mutual's policies discriminated against Petitioners on the basis of a

disability. App. 15a. Notwithstanding the undisputed fact that Mutual offered Petitioners the same opportunity to buy the same individual health insurance policies as other customers, the dissent argued that "[t]he better analogy would be that of a store which lets disabled customers in the door, but then refuses to sell them anything but inferior cameras." App. 16a. The dissent further asserted that the McCarran-Ferguson Act did not bar Petitioners' claim. App. 17a.

On August 3, 1999, the Court of Appeals denied rehearing and rehearing *en banc*. App. 80a.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Have Uniformly Held That ADA Title III Only Regulates Access To Goods And Services Offered By A Place Of Public Accommodation And Does Not Reach The Content Of Insurance Policies.

Petitioners' claim of a "split among the circuit courts on the important legal question of whether Title III ever reaches insurance policy coverage," Pet. at 13, is a fabrication. Every Court of Appeals to address the scope of ADA Title III has concluded that it does not reach the content of goods and services, including insurance policies, provided by places of public accommodation. This Court should deny *certiorari* in this case just as it did in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (*en banc*), *cert. denied*, ___ U.S.___, 118 S. Ct. 871 (1998), and *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 850 (1999).

The Seventh Circuit's holding that ADA Title III does not regulate the content of insurance policies sold to the disabled and nondisabled alike is squarely in line with consistent and well-reasoned precedent from the Courts of Appeals and this Court.

A. The Text And Structure Of ADA Title III Make Clear That It Only Regulates Access To The Goods And Services Of A Place Of Public Accommodation And Not The Content Of Such Goods And Services.

Petitioners assert that review is warranted because the Seventh Circuit declined to apply the plain language of a remedial statute and improperly limited Section 302(a) to issues of access. Pet. at 18. But, it is Petitioners who selectively and materially edit the text of the ADA. In formulating their "questions presented" to this Court, Petitioners delete the key word "place" which appears in ADA Title III.[4] The language "of any place of public accommodation," however, buttressed by the fact that the ADA defines a "place of public accommodation" only in terms of physical places, 42 U.S.C. § 12181(7)(F), unambiguously evinces Congress' intent to regulate *access* to

---

[4] ADA Section 302(a) provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods . . . of any *place* of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). However, in their first question presented, Petitioners delete the word "place": "Does Title III of the Americans with Disabilities Act, which forbids discrimination in the full and equal enjoyment of the goods and services of public accommodations, prohibit . . . ?"

the goods and services of physical facilities the ADA defines as places of public accommodation, and not the content or quality of those goods and services. The Seventh Circuit's decision gives full and proper effect to this statutory language and is in accord with the interpretation afforded ADA Title III by other Circuit Courts.

In *Parker*, the *en banc* Sixth Circuit held that ADA Title III does not prohibit a disability benefit insurance policy from limiting benefits for persons with mental disabilities. After carefully reviewing all of the statutory language, the court concluded that "[ADA] Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the place of public accommodation." 121 F.3d at 1012.

In *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453 (6th Cir. 1998), the Sixth Circuit reaffirmed *Parker* in a factual setting similar to this case. In *Lenox*, the court held that a health insurance policy did not discriminate on the basis of a disability when it excluded coverage for heart transplants, while covering other types of transplants:

> Even if the policy is deemed a good or service provided by a place of public accommodation, Lenox is not complaining about physical access to a place of public accommodation or her ability to avail herself of the goods and services offered at a place of public accommodation, such as an insurance company office. Rather, she is complaining about the mix of goods and services offered by an insurance company . . . Her complaint is that a policy that excludes heart transplants but permits other

> types of transplants is worth less to her than it is to a person with a different ailment.

Id. at 457.

The Third Circuit in *Ford* reached the same result, upholding a two-year limit applicable to benefits for mental disabilities (but not physical disabilities) under ADA Title III, reasoning:

> [W]e do not find the term "public accommodation" or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning. . . . Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled, but need not provide insurance that treats the disabled equally with the non-disabled.

145 F.3d at 613-14. *See also Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 120 (3d Cir. 1998) (requiring a " 'nexus' between the physical place of public accommodation and the services denied in a discriminatory manner").

The specific language Congress included in ADA Title III – language which Petitioners repeatedly omit – ensures that disabled persons have the same opportunity as nondisabled persons to access facilities open to the public and the goods and services offered by those facilities.[5] The Seventh Circuit found that this is all ADA Title

---

[5] No Circuit Court has adopted Petitioners' expansive interpretation of Section 302(b). Pet. at 19. Likewise, no Circuit

III requires, a result in full accord with *Parker*, *Lenox* and *Ford*. Petitioners were not denied access to Mutual's facilities, an insurance office selling Mutual products, or any of the insurance products Mutual offers. They were afforded access to the very same individual health insurance policies on the very same terms as other policyholders. Thus, the Seventh Circuit properly concluded that no ADA violation had occurred. App. 3a, 14a.

Court has agreed with Petitioners' contention that Section 501(c) manifests a congressional intent to regulate the content of insurance policies under Section 302(a) unless the insurance policy comes within Section 501(c)'s "safe harbor." Pet. at 19-20. Section 501(c), which mandates that the ADA "shall not be construed to prohibit or restrict" insurance companies from doing business in accordance with the state laws and regulations under which insurance practices are regulated, is an interpretive provision, not a substantive burden of proof. As the Seventh Circuit correctly recognized, if Doe and Smith's reasoning is correct, then it would imply that ADA Title III regulates the content not only of insurance policies, but also of all other products and services, since Section 302(a) is not limited to insurance. App. 9a. The Seventh Circuit's interpretation of 501(c) is consistent with all other Courts of Appeals to decide the issue. *See Ford*, 145 F.3d at 612 (recognizing an interpretation of Section 501(c) that would require an insurance company to present actuarial data demonstrating that a challenged provision did not violate the ADA would "require a seismic shift in the insurance business."); *Parker*, 121 F.3d at 1012 n. 5 (rejecting plaintiff's argument that ADA Title III regulates the content of insurance policies as inconsistent with the statutory text of Title IV).

B. Every Circuit Court Has Rejected Petitioners' Argument That Coverage Limits On Disabling Conditions In An Insurance Policy Discriminate On The Basis Of Disability In Violation Of ADA Title III.

The Seventh Circuit's decision is in full accord with decisions by this Court and decisions by the Third, Fourth, Sixth, and District of Columbia Circuits (as well as Seventh Circuit authority) holding that the ADA (and the Rehabilitation Act of 1973, 29 U.S.C. § 794)[6] does not mandate equality of benefits between individuals with different disabilities. No Circuit Court has agreed with Petitioners' proposed expansive and boundless interpretation of ADA Title III.

In *Parker*, the Sixth Circuit concluded that distinctions in insurance coverage equally applied to all persons do not intentionally discriminate on the basis of disability:

> [T]he ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at [the employer], whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able-bodied. . . . The fact that some may become disabled for different reasons does not amount to discrimination in providing the policy.

121 F.3d at 1015-16, 1019.

---

[6] Congress specifically incorporated the standards established under the Rehabilitation Act into the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

The Sixth Circuit relied in part upon this Court's holding in *Traynor v. Turnage*, 485 U.S. 535, 549 (1988), that the Veterans Administration did not violate the Rehabilitation Act by denying extensions of educational assistance benefits to veterans whose disabilities were attributable to their own "willful misconduct." A statement by this Court in *Traynor* is directly on point to this case: "There is nothing in the Rehabilitation Act that requires that any benefit provided to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* at 549. *See also Alexander v. Choate*, 469 U.S. 287, 303 (1985) (Tennessee's reduction of the number of inpatient days for which Medicaid would pay, which had a disproportionate effect on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act, which "does not . . . guarantee the handicapped equal results from the provision of state Medicaid").

Applying *Traynor* and *Alexander*, the Court of Appeals for the District of Columbia Circuit also held that a health benefit plan for federal employees did not violate the Rehabilitation Act by imposing a $75,000 lifetime maximum for mental illnesses, but no maximum for physical conditions. *Modderno v. King*, 82 F.3d 1059, 1062 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). The court concluded that these coverage differences were not the "sort of harm which the Rehabilitation Act was intended to address." *Id.* at 1061.

Similarly, in *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit upheld a benefit plan which limited long-term disability benefits to two years

for the mentally disabled, but not for the physically disabled, explaining:

> [T]here is no claim here that CNA discriminated on the basis of disability in offering its pension plan to anyone. It did not charge higher prices to disabled people, on the theory that they might require more in benefits. . . . Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees – the perfectly healthy, the physically disabled, and the mentally disabled – had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

Id. at 1044 (citations omitted).

Every other Circuit Court to address the issue has reached the same conclusion. *See Ford*, 145 F.3d at 608 ("So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred . . . "); *Lewis v. Kmart Corp.*, 180 F.3d 166 (4th Cir. 1999) (same under ADA Title I); *Rogers v. Dept. of Health and Envtl. Control*, 174 F.3d 431 (4th Cir. 1999) (same under Rehabilitation Act).

As the Seventh Circuit aptly noted, a contrary conclusion would engage the federal courts in "making standardless decisions about the composition of retail inventories," App. 4a, because Section 302(a) is not limited to insurance, but applies to all goods and services.

Thus, Petitioners' view of Title III would not only require insurance companies to redesign insurance products and remove limits on disabling medical conditions to ensure disabled persons achieve the same level and quality of enjoyment of their policies as nondisabled persons,[7] it would also require bookstores to stock Brailled books or books on tape because a blind person cannot fully and equally enjoy non-Brailled books. App. 5a-6a. *Accord Lenox*, 149 F.3d at 457 (plaintiff's complaint that her policy, which excluded heart transplants but allowed other types of transplants, was worth less to her than it was to a person with a different ailment was "exactly equivalent to construing Title III to compel a video store to stock closed caption video tapes because ordinary tapes are worth less to a deaf person than to one with normal hearing").

If Congress had intended to impose so enormous a burden on the retail sector of the economy, it would have made its intention clearer and imposed well-defined standards. App. 4a. Instead, the actual words of ADA Title III do not refer in any way to content, but rather are descriptive of equality in access to places of public accommodation and the goods and services generally provided by those places. Because Petitioners received access to the same health insurance policies offered to other Mutual

---

[7] As the Seventh Circuit recognized, since most health insurance policies contain benefit limits, Petitioners' view would discriminate among diseases. Diseases that happened to be classified as disabilities could not be subject to limits, but equally serious diseases that are not "disabilities" under the ADA, such as heart disease, could be. App. 3a.

customers, the Seventh Circuit correctly concluded that no ADA violation had occurred.

C. Neither *Carparts* Nor Any Other Circuit Court Has Held That The Content Of Insurance Policies Is Regulated By Title III Of The ADA.

Relying principally on *Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), Petitioners wrongly assert that there is a circuit split as to whether Title III regulates the content of insurance policies. Pet. at 15-17.[8] This assertion is all the more startling as even Petitioners admit, as they must,

---

[8] In their attempt to create a circuit conflict where none exists, Petitioners misrepresent *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960 (8th Cir. 1995). Pet. at 16. In *Henderson*, a breast cancer patient sought a preliminary injunction compelling her health plan to provide coverage for high dose chemotherapy supported by an autologous bone marrow transplant. The court determined that the plaintiff had a likelihood of succeeding on the merits if the evidence showed that the treatment was non-experimental and the plan provided the treatment for other conditions comparable to plaintiff's. *Id.* at 960. In granting injunctive relief and remanding the case to the district court for resolution of the ADA issue, the Eighth Circuit specifically noted that its findings of fact and conclusions of law were not binding. *Id.* at 962. The Eighth Circuit also noted that preliminary injunctions become easier to obtain as the plaintiff faces progressively graver harm. *Id.* at 961. Significantly, while Petitioners argue *Henderson* is an important case, they gave it scant attention (two *"see also"* references) in their brief to the Seventh Circuit. Moreover, the Eighth Circuit's decision does not refer to the ADA provisions at issue in this case or any of the appellate court cases holding that ADA Title III does not prohibit different coverage limits for different medical conditions in a health insurance policy.

that *Carparts* did not rule that ADA Title III reaches the content of insurance policies. Pet. at 15.[9]

In *Carparts*, an individual (and the company he owned) challenged under ADA Titles I and III a $25,000 lifetime benefit limitation for AIDS-related treatments in a health benefit plan offered by a trade association of which his company was a member. The district court dismissed the complaint against the defendant trade association and its administering trust, holding that places of "public accommodation" under ADA Title III only applied to " 'actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining the services therein.' " 37 F.3d at 18. The First Circuit reversed and remanded, holding that Title III does not require "public accommodations" to have physical structures for persons to enter. Rather, Title III also protects persons who purchase goods or services over the telephone or by mail, without entering an office. *Id.* at 19. The First Circuit did not decide the scope of Section 302(a) and whether that scope extended to the content of goods and services offered by places of public accommodation. Indeed, the court explicitly declined to address whether the ADA

> is intended merely to provide access to whatever product or service the subject entity may

---

[9] Petitioners cite several district court cases which they contend have applied *Carparts* to hold that Title III regulates the content of insurance policies, Pet. at 16. Petitioners' reliance on these cases, whatever the true import of their holdings, underscores the absence of a conflict in the Courts of Appeals.

> offer, or is intended in addition to shape and control which products and services may be offered.

Id.

Recognizing that "[o]ne who simply reads the Committee Report describing the operations of Title III could easily come away with the impression that it is primarily concerned with access," *id.* at 19-20, the First Circuit emphasized that its decision was extremely narrow and tentative, and did not establish a definitive ruling on the scope of Title III:

> We think that at this stage it is unwise to go beyond the possibility that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I. Not only the facts, but, as we have already noted, even the factual allegations are quite sparse. In addition, because of our resolution of the Title I claims, this case must be remanded and is subject to further proceedings regardless of whether Title III remains in the case.

Id. at 20.

Failing to demonstrate a conflict among the Circuit Courts with respect to the Seventh Circuit's holding that Section 302(a) does not require an insurance company to alter its product to make it equally valuable to the disabled and to the nondisabled, Petitioners argue that this Court should grant *certiorari* to consider whether Title III only prohibits barriers to physical access. Pet. at 16. Petitioners' perceived conflict among the Circuit Courts over

the method of access – whether by physical entry, telephone, mail, etc. – to a place of public accommodation is illusory.[10] This case does not involve a denial of access, physical or otherwise. Petitioners had access to the same individual insurance policies on the same terms as other individuals, disabled and nondisabled alike.

D. The Seventh Circuit, As Well As Every Other Circuit Court To Reach The Issue, Properly Refused To Defer To The Department Of Justice's Interpretation Of ADA Title III.

Petitioners argue that this Court should exercise discretionary review because the Seventh Circuit's holding conflicts with interpretive guidance from the DOJ opining that Title III applies to the substance of insurance contracts. Pet. at 18. The Seventh Circuit, however, as did the Sixth and Third Circuits, rejected the DOJ's view because it conflicts with the express language of the ADA. App. 11a. *Accord Ford*, 145 F.3d at 613 ("[The DOJ's] interpretation is 'manifestly contrary' to the plain meaning of Title III and, accordingly, is not binding on this court."); *Parker*, 121 F.3d at 1012 n. 5 ("As [the DOJ's] interpretation is

---

[10] Petitioners likewise exaggerate the existence of any conflict with respect to the issue of physical access. The Seventh Circuit followed *Carparts* in holding that Section 302(a) prohibits a place of public accommodation, whether in physical space or electronic space, from denying access to disabled persons. App. 2a. The Sixth Circuit specifically declined to express an opinion as to whether "a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation." *Parker*, 121 F.3d at 1011 n. 3.

inconsistent with its regulations and the statutory text of Title IV, we decline to adopt it."). Rather than in a conflict, the Courts of Appeals are in full agreement that the DOJ's position is entitled to no deference because it conflicts with the ADA's unambiguous language.

Not only is the DOJ's interpretive guidance inconsistent with the language of ADA Title III, it is contrary to the DOJ's own regulations. The DOJ's regulations plainly instruct that ADA Title III regulates access to goods and services, and not the content of such goods and services:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation provides.

28 C.F.R. Ch. 1, Pt. 36, App. B at 612 (1998). The regulations further provide that a public accommodation is not required "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a).

The meaning of these regulations is unmistakable. Just as the ADA requires a bookstore to guarantee the blind access to its books, but does not require the store to offer books on audio tape or in Braille, *see* 28 C.F.R. Ch. 1, Pt. 36, App. B at 612 (1998), the ADA does not require Mutual to redesign its insurance products or create new insurance products to meet the coverage needs of persons who are, or may become, disabled as a result of HIV infection or any other medical condition. Under the DOJ's interpretive guidance, insurance products are the *only*

goods and services whose content and design are regulated by ADA Title III. The Seventh Circuit and the other Circuit Courts have properly rejected the DOJ's contradictory and unprincipled interpretation of ADA Title III.[11]

II. The Seventh Circuit's Holding That The McCarran-Ferguson Act Precludes The Application Of Section 302(a) To The Terms Of Insurance Policies Is Consistent With Supreme Court And Federal Appeals Court Case Law

Petitioners further claim that the Seventh Circuit erred in its additional holding that Petitioners' interpretation of Section 302(a) would " 'interfere with a State's administrative regime' " in violation of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). App. 12a (quoting *Humana Inc. v. Forsyth*, 525 U.S. 299, 119 S. Ct. 710 (1999)). The Seventh Circuit's holding, however, is in accord with *Humana* and the Third Circuit's decision in *Ford*. Significantly, Petitioners fail to cite a single appellate court

---

[11] Petitioners rely heavily on this Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998). Pet. at 18, 21, 22, 24. *Bragdon* simply addressed the issue of whether HIV infection is a disability under the ADA. The Court did not consider the scope of ADA Title III. Further, as more recent decisions by this Court confirm, there is nothing in *Bragdon* which requires a federal court to be controlled by the DOJ's interpretive guidelines and other informal expressions of its views. *See Sutton v. United Air Lines, Inc.*, ___ U.S. ___, 119 S. Ct. 2139, 2145-46 (1999) (rejecting the approach adopted by the DOJ's and EEOC's interpretive guidelines – that persons claiming to be disabled should be evaluated in their hypothetical uncorrected state – as an "impermissible interpretation" of the ADA).

decision with which the Seventh Circuit's conflicts. In the absence of any conflict or inconsistency between the Seventh Circuit's holding and the decisions of this Court or any Circuit Court, Petitioners' request for review should be denied.

The Seventh Circuit correctly applied *Humana* in holding that application of Section 302(a) to the content of insurance policies would impair state law and run afoul of McCarran-Ferguson by interfering with the State of Illinois' extensive administrative scheme over all insurance practices. Petitioners argue that a federal law that exempts conduct in compliance with state law cannot be said to "invalidate, impair, or supersede" state law. Pet. at 13. In *Humana*, however, this Court cautioned that Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 717. It is enough if application of the federal law would "interfere with a State's administrative regime." App. 12a, quoting *Humana*, 119 S. Ct. at 717. As the Seventh Circuit correctly recognized, "even if the formal criteria are the same under federal and state law, displacing their administration into federal court . . . obviously would interfere with the administration of the state law." App. 13a.

The business of insurance, including coverage limits and exclusions in insurance policies, has been extensively regulated by the states, including Illinois, for decades. Especially relevant to this case, Illinois has expressly reserved to its Department of Insurance the exclusive right to determine whether a challenged term or condition in an insurance policy sold in Illinois unlawfully

discriminates in violation of 215 ILCS 5/364.[12] *See also* 410 ILCS 50/3(c) (recognizing insurance companies can require applicants for insurance coverage to be tested for HIV infection and regulating the manner in which applicants are notified of adverse underwriting or coverage decisions based on test results). Thus, application of Section 302(a) to the content of an insurance policy "impairs" Illinois law by diminishing and interfering with the power of the Illinois Department of Insurance to regulate and apply Illinois insurance laws.

Ignored by Petitioners, the Seventh Circuit's holding is in accord with the Third Circuit's decision in *Ford*. There, the plaintiff relied on Section 501(c) to support her argument that the disparity in benefits for mental and physical disabilities violated ADA Title III. Consistent with its "statutory duty under the McCarran-Ferguson Act regarding insurance cases," 145 F.3d at 611, the Third Circuit declined to construe Section 501(c) to require a "seismic shift in the insurance business." *Id.* at 612. Since the Circuit Courts are in agreement, no appropriate issue for review is properly posed.

---

[12] Section 364 of the Illinois Insurance Code, 215 ILCS 5/364, provides that "[n]o company, in any policy of accident or health insurance issued in this State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities . . . in the amount of any dividends or other benefits payable thereon, or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principles or is related to actual or reasonably anticipated experience."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOEL H. KAPLAN
(Counsel of Record)
THOMAS J. PISKORSKI
CASSANDRA L. CURRY
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent
Mutual of Omaha
Insurance Company